IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

PETER SHIANNA,	)	
	)	
Plaintiff,	)	
	)	**CIVIL ACTION**
v.	)	
	)	**No. 04-2103-CM**
	)	
HARTFORD FIRE INSURANCE COMPANY,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM AND ORDER

Plaintiff Peter Shianna brings this action pursuant to the Age Discrimination in Employment Act ("ADEA"), claiming that he was terminated and subjected to discriminatory terms and conditions of employment because of his age. Defendant Hartford Fire Insurance Company, plaintiff's former employer, denies plaintiff's allegations, and maintains that it terminated plaintiff's employment because plaintiff had poor sales production in the years 2001, 2002, and 2003. The case is before the court on Hartford Fire Insurance Company's Motion for Summary Judgment (Doc. 32). Because the court finds that genuine issues of material fact exist as to whether defendant acted in violation of the ADEA, the court denies the motion.

The court has reviewed the record and the parties' briefs. Notably, much of the evidence that plaintiff presents in opposition to defendant's motion is inadmissible. Plaintiff's affidavit, which supports the majority of his Statement of Additional Facts, contains numerous paragraphs of self-serving, conclusory allegations not properly supported by other evidence. The court has not considered plaintiff's allegations

which are based solely on unsupported statements in his affidavit. *See Annett v. Univ. of Kan.*, 371 F.3d 1233, 1237 (noting that "'[u]nsupported conclusory allegations . . . do not create a genuine issue of fact'" (citation omitted)). Even without considering this evidence, however, the court determines that there are genuine issues of fact for a jury to consider.

Summary judgment is appropriate if the moving party demonstrates that there is "no genuine issue as to any material fact" and that it is "entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In applying this standard, the court views the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

Plaintiff does not claim that he has direct evidence of discrimination. In the absence of direct evidence of discrimination, the court analyzes plaintiff's claim under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under *McDonnell Douglas*, the plaintiff bears the initial burden of establishing a prima facie case of discrimination. *Id.* at 802. If the plaintiff presents a prima facie case, then the burden shifts to the defendant to produce a legitimate, non-discriminatory reason for the employment action. *Id*. If the defendant meets its burden, then the plaintiff must demonstrate that an issue of material fact exists as to whether the defendant's proffered reason is merely pretextual. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507-08 (1993). Pretext can be established if the plaintiff shows either "that a discriminatory reason more likely motivated the employer or . . . that the employer's proffered explanation is unworthy of credence." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981). "[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the

employer unlawfully discriminated." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000); *see also McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1128 (10th Cir. 1998) ("In evaluating ADEA claims, the Tenth Circuit uses the three-stage analysis outlined in *McDonnell Douglas*.").

To establish a prima facie case under the ADEA, the plaintiff must show that (1) he was within the protected age group; (2) he was doing satisfactory work; (3) he was subjected to an adverse employment action; and (4) his position was filled by a substantially younger person.[1] *Rivera v. City and County of Denver*, 365 F.3d 912, 919 (10th Cir. 2004) (quoting *McKnight*, 149 F.3d at 1128); *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312-13 (1996).

The court finds that plaintiff has established a prima facie case. Plaintiff, who was sixty-two years old at the time of his discharge, was a member of a protected group. Although defendant challenges the quality of plaintiff's work, plaintiff has offered evidence suggesting that his performance was equal to or better than the performance of others who were not fired. He also has offered evidence that his position was filled by a substantially younger person.[2]

Defendant has offered a legitimate, non-discriminatory reason for discharging plaintiff, returning the burden to plaintiff to show that defendant's reason was merely a pretext for discrimination. The court finds that, while the evidence is not overwhelming in this case, plaintiff has presented evidence from which a reasonable jury could find that defendant set him up to fail. *Cf. Watson v. Norton*, 10 Fed. Appx. 669,

---

[1] The court rejects plaintiff's argument that he need only show that the position was not filled to establish a prima facie case. *See Rivera*, 365 F.3d at 919 (citation omitted).

[2] Defendant argues that because someone else within the company merely took over plaintiff's job duties and defendant did not hire a replacement for plaintiff, plaintiff failed to meet the last element of the prima facie case. But one person within the company took over all of plaintiff's duties. The cases defendant cites refer to instances where the plaintiff's duties were spread out over multiple employees, and are distinguishable from this case.

679 (10th Cir. 2001) (holding that an employee can show pretext by showing that a supervisor set him up to fail). Defendant required plaintiff to make eighty percent of his sales goal by July 31, 2003 in order to keep his job. Apparently, defendant did not require the same of a substantially younger employee who was similarly situated to plaintiff.[3] And no other employee, even those employees who were not lagging in sales, made eighty percent of their sales goals by July 31. The court recognizes that defendant has presented evidence suggesting that plaintiff's situation differed from that of other employees and that defendant gave plaintiff multiple chances to increase his sales and keep his job. But viewing the evidence in the light most favorable to plaintiff, as the court must, the court finds that sufficient issues of fact exist to submit this case to a jury.

IT IS THEREFORE ORDERED that Hartford Fire Insurance Company's Motion for Summary Judgment (Doc. 32) is denied.

Dated this 14th day of April 2006, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge

[3] The court rejects defendant's argument that evidence of how it treated similarly-situated employees is irrelevant. *Cf. Salquero v. City of Clovis*, 366 F.3d 1168, 1176 (10th Cir. 2004) ("[T]ypically, a plaintiff may show pretext . . . 'with evidence that . . . he was treated differently from other similarly-situated employees who violated work rules of comparable seriousness.'" (citation omitted)).